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SURFACE TRANSPORTATION BOARD[1]

DECISION

No. 41616

NATIONAL ENQUIRER, INC.--PETITION FOR DECLARATORY ORDER--
CERTAIN RATES AND PRACTICES OF TSC EXPRESS CO.

Decided: March 13, 1998

We find that the collection of undercharges sought in this proceeding would be an unreasonable practice under 49 U.S.C. 10701(a) and section 2(e) of the Negotiated Rates Act of 1993, Pub. L. No. 103-180, 107 Stat. 2044 (NRA) (now codified at 49 U.S.C. 13711). Because of our finding under section 2(e) of the NRA, with the exception of the two preliminary jurisdictional matters discussed below, we will not reach the other issues raised in this proceeding.

BACKGROUND

This matter arises out of a court action in the United States Bankruptcy Court for the Northern District of Georgia, Atlanta Division, in *L. Lou Allen, Trustee on Behalf of The Bankruptcy Estate of TSC Express Co. v. National Enquirer, Inc.*, Case No. 91-69474, Adv. No. 93-6290. The court proceeding was instituted by L. Lou Allen, Trustee on Behalf of The Bankruptcy Estate of TSC Express Company (TSC or respondent), a former motor common and contract carrier, to collect undercharges from National Enquirer, Inc. (Enquirer or petitioner). TSC seeks undercharges of $96,095.56 (plus interest) allegedly due, in addition to amounts previously paid, for services rendered in transporting 2,509 less-than-truckload (LTL) shipments of newspapers between May 10, 1988, and July 29, 1989. The shipments were transported from petitioner's distribution facilities in Atlanta, GA, and Nashville, TN, to points in Tennessee, Kentucky, Mississippi, Arkansas, Alabama, Georgia, and Florida. By order dated August 14, 1995, the court

[1] The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (the ICC Termination Act or the Act), which was enacted on December 29, 1995, and took effect on January 1, 1996, abolished the Interstate Commerce Commission (ICC) and transferred certain functions and proceedings to the Surface Transportation Board (Board). Section 204(b)(1) of the Act provides, in general, that proceedings pending before the ICC on the effective date of that legislation shall be decided under the law in effect prior to January 1, 1996, insofar as they involve functions retained by the Act. This decision relates to a proceeding pending with the ICC prior to January 1, 1996, and to functions that are subject to Board jurisdiction pursuant to 49 U.S.C. 13709-13711. Therefore, this decision applies the law in effect prior to the Act, and citations are to the former sections of the statute, unless otherwise indicated.

stayed the proceeding and directed petitioner to submit issues of rate reasonableness, commodity exemption, and unreasonable practice to the ICC for resolution.[2]

Pursuant to the court order, Enquirer, on September 11, 1995, filed a petition for declaratory order requesting the ICC to resolve the issues referred to by the court. By decision served September 22, 1995, a procedural schedule was established for the submission of evidence on non-rate reasonableness issues. Petitioner filed its opening statement on December 19, 1995. Respondent filed a reply statement on January 30, 1996, and petitioner filed its statement in rebuttal on February 7, 1996.

Enquirer asserts that respondent's attempt to collect additional freight charges constitutes an unreasonable practice under section 2(e) of the NRA and that the rates respondent seeks to assess are unreasonable. Enquirer also argues that the shipments subject to this proceeding consist entirely of newspapers, a commodity that, pursuant to 49 U.S.C. 10526(a)(7), is exempt from federal tariff filing regulation.

Enquirer supports its argument with affidavits from Ben Roberts, its Director of Transportation,[3] and Michael Bange of Champion Transportation Services, Inc., a transportation consultant retained by petitioner. Mr. Roberts states that Enquirer was offered a transportation rate by TSC, that Enquirer tendered freight to TSC in reliance on that transportation rate, that TSC billed Enquirer at the offered rate, and that all of the original freight bills issued to Enquirer were paid in full. He maintains that TSC's originally assessed rates were competitive with rates charged by other carriers and that Enquirer would never have used the services of TSC at the rates currently being sought.

Mr. Bange conducted an audit and analysis of the balance due bills and claims of respondent. According to Mr. Bange, respondent originally assessed petitioner a rate of $2.50 or $2.60 per hundredweight for its services. Included among the attachments to Mr. Bange's affidavit is a copy of the original court complaint filed by respondent that lists each of the subject undercharge claims by freight bill number together with the original billing date and balance due amount claimed (Exhibit C). Mr. Bange also attached a representative sample of 18 "balance due" freight bills issued by respondent that reflect originally issued freight bill data as well as "corrected" balance due amounts (Exhibit B). Each of the representative freight bills indicates an originally assessed rate of $2.50 or $2.60 per hundredweight. In addition, Mr. Bange's affidavit includes a letter dated June 11, 1987, from Edsel L. Cleveland, TSC Vice President-Operations, to Mr.

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[2] The court administratively closed the proceeding and directed the parties to advise the court of the ICC's determinations. It also found that the provisions of the NRA are constitutional and applicable to the subject matter of this proceeding.

[3] Mr. Roberts' affidavit was dated June 14, 1994. It had been submitted in the underlying bankruptcy court adversary proceeding.

Roberts, offering Enquirer a single rate of $2.50 per 100 pounds, subject to a $20 minimum, for service throughout TSC's territory.

TSC asserts that the initially assessed charges were not authorized by an applicable filed tariff and that balance due bills were issued to recover the applicable charges. It maintains that section 10526(a)(7) is applicable only to vehicles used exclusively to distribute newspapers and that the record fails to establish that the subject LTL newspaper shipments were transported exclusively with other LTL newspaper shipments rather than commingled with other commodities. TSC further contends that section 2(e) of the NRA is inapplicable to bankrupt carriers, may not be applied retroactively, and is unconstitutional.[4]

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[4] As noted, the judge in the underlying proceeding here has already determined that TSC's arguments on these matters are without merit. Additionally, we point out that six federal circuit courts of appeals and virtually every other federal court that has considered respondent's applicability arguments have determined that the remedies provided in section 2 of the NRA apply to the undercharge claims of bankrupt carriers such as TSC's. *See Whitaker v. Power Brake Supply, Inc.*, 68 F.3d 1304 (11th Cir. 1995) (*Power Brake*); *Jones Truck Lines, Inc. v. Whittier Wood Products, Inc.*, 57 F.3d 642 (8th Cir. 1995) (*Whittier Wood)*; *In the Matter of Lifschultz Fast Freight Corporation*, 63 F.3d 621 (7th Cir, 1995); *In re Transcon Lines*, 58 F.3d 1432 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 1016 (1996); *In re Bulldog Trucking, Inc.*, 66 F.3d 1390 (4th Cir. 1995); *Hargrave v. United Wire Hanger Corp*., 73 F.3d 36 (3d Cir. 1996); *see also, e.g., Jones Truck Lines, Inc. v. AFCO Steel, Inc*., 849 F. Supp. 1296 (E.D. Ark. 1994).

Further, as the courts have also held consistently, section 2(e), by its own terms and as more recently amended by the ICC Termination Act, may be applied retroactively against the undercharge claims of defunct, bankrupt carriers that were pending on the NRA's enactment. *See, e.g., Jones Truck Lines, Inc. v. Scott Fetzer Co.*, 860 F. Supp. 1370, 1375-76 (E.D. Ark. 1994); *North Penn Transfer, Inc. v. Stationers Distributing Co.*, 174 B.R. 263 (N.D. Ill. 1994); *Gold v. A.J. Hollander Co.* (In re Maislin Indus.), 176 B.R. 436 (Bankr. E.D. Mich 1995); *cf. Jones Truck Lines, Inc. v. Phoenix Products Co.*, 860 F. Supp. 1360 (W.D. Wisc. 1994).

Lastly, in response to respondent's "takings" challenge, the Eighth Circuit in *Whittier Wood* and the Eleventh Circuit in *Power Brake* have concluded that the NRA does not work an unconstitutional taking under the Fifth Amendment. 57 F.3d at 649-52; 68 F.3d at 1306 n.3. We point out that the courts have consistently rejected that argument, as well as respondent's "separation of powers" argument and its other constitutional challenges to the NRA. *See, e.g., Gold v. A.J. Hollander, supra; American Freight System, Inc. v. ICC* (In re American Freight System, Inc.), 179 B.R. 952 (Bankr. D. Kan. 1995); *Rushton v. Saratoga Forest Product's, Inc.* (In re Americana Expressways), 177 B.R. 960 (D. Utah 1995), *rev'g* 172 B.R. 99 (Bankr. D. Utah 1994); *Zimmerman v. Filler King Co.* (In re KMC Transport), 179 B.R. 226 (Bankr. D. Idaho 1995); *Lewis v. Squareshooter Candy Co.*, (In re Edson Express), 176 B.R. 54 (D. Kan. 1994).

Respondent submits as part of its reply the verified statement of Stephen L. Swezey, Senior Transportation Consultant for Carrier Service, Inc., (CSI).[5] Mr. Swezey explains the basis for the issuance of the balance due bills[6] and discusses the applicability of the exemption of 49 U.S.C. 10526(a)(7). Attached as Exhibit C to Mr. Swezey's statement is a representative sample of 10 balance due freight bills that reflect originally assessed rates of $2.50 or $2.60 per hundredweight.

In rebuttal, Enquirer maintains that the subject shipments were not commingled with other non-exempt commodities and that respondent has offered no evidence to support its assertion to the contrary.

PRELIMINARY MATTERS

Intrastate shipments. Based on affidavits of Mr. Shinn and Mr. Swezey attached to the submissions of Mr. Bange and Mr. Swezey,[7] it appears that approximately 751 of the subject shipments moved entirely within the State of Georgia. We recognize that our jurisdiction is limited to interstate shipments only, 49 U.S.C. 10521. Because of the marked lack of evidence and discussion on the record with respect to the interstate or intrastate nature of these movements, however, we are unable to make a determination as to the interstate or intrastate status of these shipments. Accordingly, the parties are advised that the conclusions reached in this decision are applicable only to shipments that moved in interstate commerce.

Newspaper Exemption in 49 U.S.C. 10526(a)(7). Enquirer argues that the shipments at issue consist entirely of newspapers and are exempt from regulation under 49 U.S.C. 10526(a)(7). Petitioner contends that, because the involved shipments were not subject to federal regulation, no cause of action exists under the filed rate doctrine to support respondent's undercharge claim. Enquirer asserts that TSC failed to produce a witness with personal knowledge of the subject shipments, failed to submit any evidence that the shipments consisted of anything other than newspapers, and did not establish that any other commodities were commingled with the newspaper shipments.

TSC contends that the subject exemption does not simply apply to the commodity newspapers; rather, the exemption is specifically directed at the vehicle in which newspapers are transported and attaches only when the vehicle is used exclusively to distribute newspapers. TSC maintains that the involved shipments were LTL shipments that were commingled with other general

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[5] CSI is the organization authorized by the bankruptcy court to provide rate, audit, and collection services on behalf of TSC.

[6] Attached to Mr. Swezey's statement as Exhibit A is an affidavit from Charles B. Shinn, another CSI auditor, that discusses in detail the process used in re-rating the original freight bills.

[7] These affidavits were filed in various phases of the underlying court proceeding and were attached as Exhibits G and H to the Bange affidavit and Exhibit A to the Swezey statement.

commodity LTL shipments within the same trailer and transported by TSC in its regular common carrier service. Therefore, TSC argues, the exemption does not apply to the subject shipments.

The exemption in 49 U.S.C. 10526(a)(7) applies to "*a motor vehicle* used *only* to distribute newspapers" (emphasis added). Thus, the exemption applies to the vehicle used for the transportation rather than the commodity transported, and it applies when that vehicle is used solely to transport the commodity. The freight bills submitted by the parties show that the involved movements consisted of LTL shipments of specified printed matter ranging in weight from 405 to 3,197 pounds. Although there is no evidence that these LTL shipments were combined with other LTL shipments to meet truckload weight requirements (generally at least 40,000 pounds), it is quite apparent that this is what occurred. Absent compelling evidence to the contrary, we will not make a finding that would defy normal operating procedures in the industry, i.e., that this large number of rather small LTL shipments moved exclusively in vehicles without commingling with other LTL shipments. Accordingly, we conclude that the exemption does not apply and that petitioner's interstate movements are subject to our jurisdictional review.

DISCUSSION AND CONCLUSIONS

We dispose of this proceeding under section 2(e) of the NRA. Accordingly, except to the extent discussed above, we do not reach the other issues raised.

Section 2(e)(1) of the NRA provides, in pertinent part, that "it shall be an unreasonable practice for a motor carrier of property . . . providing transportation subject to the jurisdiction of the [Board] . . . to attempt to charge or to charge for a transportation service . . . the difference between the applicable rate that [was] lawfully in effect pursuant to a [filed] tariff . . . and the negotiated rate for such transportation service . . . if the carrier . . . is no longer transporting property . . . or is transporting property . . . for the purpose of avoiding application of this subsection."[8]

It is undisputed that TSC no longer transports property. Accordingly, we may proceed to determine whether TSC's attempt to collect undercharges (the difference between the applicable filed tariff rate and the rate originally collected) is an unreasonable practice.

Initially, we must address the threshold issue of whether sufficient written evidence of a negotiated rate agreement exists to make a section 2(e) determination. Section 2(e)(6)(B) defines the term "negotiated rate" as one agreed on by the shipper and carrier "through negotiations pursuant

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[8] Section 2(e), as originally drafted, applied only to transportation service provided prior to September 30, 1990. Here, we note, the shipments at issue moved before September 30, 1990. In any event, 49 U.S.C. 13711(g), which was enacted in the ICC Termination Act as an exception to the general rule noted in footnote 1 to this decision, deletes the September 30, 1990 cut-off date as to proceedings pending as of January 1, 1996.

to which no tariff was lawfully and timely filed . . . and for which there is written evidence of such agreement." Thus, section 2(e) cannot be satisfied unless there is written evidence of a negotiated rate agreement.

Here, the record contains a June 1987 letter from TSC offering Enquirer a rate of $2.50 per 100 pounds for service throughout TSC's territory. In addition, petitioner and respondent have submitted 28 representative "balance due" freight bills that indicate that petitioner was originally assessed rates of $2.50 or $2.60 per hundredweight for the services rendered by respondent. We find this evidence sufficient to satisfy the written evidence requirement. *E.A. Miller, Inc.--Rates and Practices of Best,* 10 I.C.C.2d 235 (1994) (*E.A. Miller*).[9] *See William J. Hunt, Trustee for Ritter Transportation, Inc. v. Gantrade Corp.,* C. A. H-89-2379 (S.D. Tex. March 31, 1997) (finding that written evidence need not include the original freight bills or any other particular type of evidence, as long as the written evidence submitted establishes that specific amounts were paid that were less than the filed rate and that the rates were agreed upon by the parties).

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[9] TSC, at page 13 of its reply statement, argues that freight bills do not constitute written evidence. Respondent contends that, under section 2(e)(2)(D) of the NRA, the Board must consider whether the negotiated rate was billed and collected by the carrier "in making its merits determination as to whether a carrier's conduct was an "unreasonable practice." This section, according to TSC, contemplates that freight bills reflecting the negotiated rate were issued by the carrier, and the Board must examine these freight bills to determine if section 2(e) has been satisfied. TSC asserts that allowing freight bills to satisfy the written evidence requirement would make the written evidence provision superfluous because the Board, under section 2(e)(2)(D), must independently consider the collected freight bill.

The ICC and the Board have consistently rejected this argument. Section 2(e)(2(D) requires the Board to consider "whether the unfiled rate was billed and collected by the carrier." There is no requirement under this provision or the NRA's legislative history that the Board use a carrier's freight bills for that determination. A carrier may separately attest, or submit or concede in pleading, that the negotiated, unfiled rate was billed and collected, and there is nothing to preclude the Board from using such statements (or other evidence) in finding that section 2(e)(2)(D) was satisfied.

Even if the Board used freight bills to satisfy this element, however, it is not inappropriate for it to use those same bills to satisfy the "written evidence" requirement of section 2(e)(6)(B). The carrier's argument might be more persuasive if the "written evidence" requirement were a "sixth" element of the merits determination under section 2(e)(2), but it is not. Rather, as the ICC previously indicated, it is simply a threshold definitional requirement needed to invoke section 2(e). *See E.A. Miller*, *supra*, at 239-40. Once that requirement is satisfied by freight bills (or other contemporaneous written evidence), there is nothing to suggest that the same evidence could not be used as part of the Board's separate five-part analysis under section 2(e)(2) to determine whether the carrier's undercharge collection is an unreasonable practice.

In this case, the evidence is substantial that the parties conducted business in accordance with agreed-to negotiated rates. The consistent application in the original freight bills of rates of $2.50 or $2.60 per hundredweight, which closely conform with the rates quoted in the TSC letter of June 1987, confirm the testimony of Mr. Roberts, and reflect the existence of negotiated rates.

In exercising our jurisdiction under section 2(e)(2), we are directed to consider five factors: (1) whether the shipper was offered a transportation rate by the carrier other than the rate legally on file [section 2(e)(2)(A)]; (2) whether the shipper tendered freight to the carrier in reasonable reliance upon the offered rate [section 2(e)(2)(B)]; (3) whether the carrier did not properly or timely file a tariff providing for such rate or failed to enter into an agreement for contract carriage [section 2(e)(2)(C)]; (4) whether the transportation rate was billed and collected by the carrier [section 2(e)(2)(D)]; and (5) whether the carrier or the party representing such carrier now demands additional payment of a higher rate filed in a tariff [section 2(e)(2)(E].

Here, the evidence establishes that a negotiated rate was offered to Enquirer by TSC; that Enquirer, reasonably relying on the offered rate, tendered the subject traffic to TSC; that the negotiated rate was billed and collected by TSC; and that TSC now seeks to collect additional payment based on a higher rate filed in a tariff. Therefore, under 49 U.S.C. 10701(a) and section 2(e) of the NRA, we find that it is an unreasonable practice for TSC to attempt to collect undercharges from Enquirer for the shipments at issue in this proceeding.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. This proceeding is discontinued.

2. This decision is effective on its service date.

3. A copy of this decision will be mailed to:

The Honorable James E. Massey
United States Bankruptcy Court
for the Northern District of Georgia,
Atlanta Division
Richard B. Russell Federal Building
and U.S. Courthouse
75 Spring St., S.W.
Room 1215
Atlanta, GA 30303

Re: Case No. 91-69474, Adv. No. 93-6290

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary